No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 192–203) are reported in 8 N. L. R. B. 866. The opinion and dissenting opinion in the Circuit Court of Appeals are reported in 101 F. (2d) 841.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 235–236) was entered on February 28, 1939. The petition for a writ of certiorari was filed on March 22, 1939, and was granted on April 24, 1939.

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10, paragraphs (c) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

The Board found that respondent has dominated and interfered with the formation and administration of a labor organization of its employees and has contributed to it financial and other support and that respondent is dominating and interfering with the administration of the organization, all contrary to Section 8 (2) of the National Labor Relations Act. The question is whether the Board, in addition to ordering respondent to cease and desist from such acts, properly required respondent to withdraw all recognition from the organization as a representative of respondent's employees for purposes of collective bargaining, and completely to disestablish the organization as such a representative.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

* * * * *

SEC. 10. (c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

STATEMENT

A charge (R. 1) having been filed with the Board by the Industrial Union of Marine & Shipbuilding Workers of America, a labor organization, the Board, by its Regional Director at Baltimore, Maryland, issued on June 18, 1937, a complaint and notice of hearing (R. 2–4) which were duly served upon respondent. In addition to jurisdictional allegations the complaint, so far as now material, alleged that respondent had dominated, supported, and interfered with the formation of the Employees' Representation Committee of the Newport News Shipbuilding & Dry Dock Company (hereinafter referred to as "the Plan"[1]), and that respondent thereby had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (2) and Section 2 (6) and (7) of the Act (R. 2–4).[2]

Respondent, after an unsuccessful attempt to enjoin the agents of the Board from proceeding with the case (*Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler*, 303 U. S. 54), appeared

[1] The term "revised Plan" will be used to refer to this organization as it existed after the amendments of May 1937 (see pp. 10, 24–25, *infra*).

[2] The complaint also alleged that respondent had discharged seven of its employees in violation of Section 8 (3) of the Act (R. 2–3). These allegations were dismissed by the Trial Examiner with respect to all but four of these employees (R. 186), and by the Board with respect to the remainder (R. 203).

specially and filed a motion to dismiss the complaint for lack of jurisdiction. It also filed an answer (R. 4–7), admitting in part the jurisdictional allegations of the complaint, and also admitting that in 1927, in cooperation with its employees, "it aided in putting into force and effect at its shipyard a plan of employee representation" (R. 6), and that "it did lend its moral support and encouragement to the formation and continuation of said plan" (*id.*). It denied, however, that it had engaged in unfair labor practices within the meaning of the Act. Prior to the hearing the Employees' Representation Committee, one of the committees administering the revised Plan, obtained leave to intervene and filed an answer denying the allegations of the complaint (R. 7–10).

A hearing was held from August 30 to September 8, 1937, before a Trial Examiner designated by the Board (R. 10–146). Full opportunity to examine and cross-examine witnesses and to introduce evidence was afforded all the parties. On March 9, 1938, the Trial Examiner filed an intermediate report, finding that respondent had engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3)[3] of the Act, and recommending that respondent cease and desist from such practices and take certain affirmative action to remedy them, including the withdrawal of recognition from, and disestablishment of, the

[3] See footnote 2, page 4, *supra*.

Plan as a representative of respondent's employees (R. 177–186). Exceptions were filed by respondent (R. 187–191) and by the Committee, and on May 11, 1938, counsel for respondent, the Committee, and the Union participated in oral argument before the Board, respondent also filing a brief. On August 9, 1938, the Board issued its finding of fact, conclusions of law, and order (R. 192–203). The facts, as found by the Board, may be summarized as follows:

Nature of Respondent's operations.—Respondent, a Virginia corporation, owns and operates at Newport News, Virginia, one of the most important shipyards in the United States (R. 194, 195). Respondent there engages in the business of designing, constructing, overhauling, and repairing ships for the United States Navy and for foreign and domestic interests, and in building water turbines (R. 194). At the time of the hearing it employed about 5,500 persons (R. 195).

The enterprise is dependent to a very substantial extent upon interstate commerce for its materials and supplies. Between January 1936 and August 1937 respondent purchased outside the State of Virginia approximately 90 percent of the $13,000,000 worth of materials used in its business. These out-of-state purchases included all of the steel and coal used, more than 82 percent of the

lumber, and 87 percent of the remaining materials (R. 194).

Although the greater part of respondent's production consists of ships built for the United States Navy, from June 1934 to the date of the hearing it had under construction three merchant vessels at contract prices aggregating $1,020,000 (R. 195). A considerable portion of respondent's business also consists of repairing and overhauling vessels of both foreign and domestic registry. Between July 1935 and August 1937 respondent serviced 322 vessels at a billing price of over $3,000,000 (R. 195). Included were 43 ships of foreign registry and 279 of American registry, all of the former and a substantial number of the latter being engaged in interstate or foreign commerce (R. 195).[4]

The unfair labor practices.—The Plan dates from the year 1927 when it was first put into effect by respondent in cooperation with its employees (R. 196). The purposes of the Plan were stated in its preamble (R. 196):

> In order to give the employees of the Company a voice in regard to the conditions under which they labor, and to provide an orderly and expeditious procedure for the prevention and adjustment of any future

[4] The petition for certiorari presents no question concerning the jurisdiction of the Board and no cross-petition has been filed.

differences, and to anticipate the problem of continuous employment, a method of representation of employees is to be established.

By this original Plan provision was made for the annual election by the employees of 21 white and 7 colored representatives, who were to be paid $100 annually by respondent for serving in that capacity. Supervisory employees were ineligible to vote or serve as representatives. The Plan was administered by five[5] committees, each composed of five elected representatives and not more than five representatives selected by the management from among the employees. The Plan also provided for a Management's Representative, who was to "keep the Management in touch with the Representatives, and represent the Management in negotiations with the Representatives, their Officers and Committees." A provision for arbitration of differences became effective only upon the concurrence of respondent's president. Amendments of the Plan required a vote of either two-thirds of the full membership (including management representatives) of the Rules Committee or a majority of all the elected and management representatives at an annual conference. No provision was made for dues. (R. 196–197.)

The Plan was revised in 1929, 1931, 1934, 1936, and 1937. In substance, however, the 1931 revision

[5] The Board's decision erroneously states (R. 196) that there were four committees.

was maintained until 1937. Under it there were seven changes worthy of note. (1) One white and one colored employee representative was elected by the employees in each department and division, the management appointing an equal number of management representatives. (2) The annual remuneration paid elected employees was reduced to $60. (3) The five governing joint committees were supplanted by a General Joint Committee composed of all elected and management representatives (a majority of each class constituting a quorum) and empowered to take final action upon all subjects referred to it by any elected or management representative or by the Management's Representative, subject to the approval of the president of respondent. (4) An Executive Committee was created, composed of five elected representatives and five management representatives. (5) Nominations and elections were to be arranged for by the Management's Representative,* but "in so far as possible conducted by the employees themselves." (6) The provision for arbitration of grievances upon consent of the president of respondent was eliminated in favor of a provision that if the Executive Committee failed to settle the matter "the President of the Company shall be notified." (7) The former provision for amend-

* The Board's decision erroneously states (R. 197) that the nominations and elections were to be arranged for by the management's representatives.

ments was eliminated in favor of a provision that amendments could be made by a two-thirds vote of the entire General Joint Committee, "when approved by the President of the Company." (R. 197.)

The Board found that from the Plan's inception in 1927 until its final revision in 1937 respondent dominated, assisted, and interfered with its formation and administration (R. 197).

The 1937 revision occurred in May, shortly after this Court had sustained the constitutionality of the Act, but 22 months after the effective date of the Act. It originated in the General Joint Committee, one-half of the members of which were management representatives, and was referred for suggestions to the similarly constituted Executive Committee and to the elected representatives separately. The personnel manager and the general manager of respondent each took an active part in the revision of the Plan. On May 20, 1937, after the Management's Representative announced that the revision was acceptable to respondent, the revised Plan was adopted by the General Joint Committee (R. 197).

The Board found that since the procedure followed was that of amendment of the existing Plan—a procedure which required respondent's consent—the revision could not possibly have been free from domination and interference by respondent with the employees and their elected representatives (R. 198).

The Board also found that the provisions of the revised Plan made it still the creature of respondent. The revised Plan eliminated the compensation paid to elected representatives, and substituted for the General Joint Committee and the Executive Committee a single Employees' Representative Committee, composed of representatives elected by the employees. However, the revised Plan provided that the action of the Committee should be final and effective "upon agreement by the Company," and that any article could be amended by two-thirds of the entire membership of the Committee "unless disapproved by the Company within 15 days after their passage." The procedure for settling grievances concludes with the presentation of the grievance to respondent's personnel manager or general manager. As thus revised, the Plan was printed in book form at respondent's expense, and distributed by respondent's supervisors. Copies of the minutes of each meeting held by the Committee are duplicated at respondent's expense and on respondent's stationery, and distributed through respondent's yard mailing service, one copy being regularly sent to respondent's personnel manager. (R. 198-199.)

The Board found that respondent had dominated and interfered with the formation and administration of the Plan, and had contributed support to it (R. 199). The Board also found that

under the revised Plan respondent had power to stifle independent action of the Committee, and that the Committee is incapable of serving respondent's employees as their genuine representative for purposes of collective bargaining (R. 199).

Upon these findings, the Board concluded that respondent had engaged and was engaging in unfair labor practices within the meaning of Section 8 (1) and (2) and Section 2 (6) and (7) of the Act. It thereupon entered an order (R. 203) requiring respondent to cease and desist from such unfair labor practices, to withdraw all recognition from the Plan as a representative of its employees, completely to disestablish the Plan as such representative, and to post appropriate notices. The complaint was dismissed with respect to the alleged violations of Section 8 (3) of the Act (R. 203; see footnote 2, page 4, *supra*).

On August 18, 1938, respondent, pursuant to Section 10 (f) of the Act, filed with the court below its petition to review the foregoing order (R. 204–210). On August 29, 1938, the Board filed an answer and request for enforcement of its order (R. 211–215). On February 28, 1939, the court directed the enforcement of the order with the elimination therefrom of paragraph 2 (a), requiring withdrawal of recognition from and disestablishment of the Plan as a representative of the employees (R. 222–231). Judge Parker, dissenting in part, was of opinion that the order should have

been granted full enforcement (R. 231–234). On March 22, 1939, the Board filed a petition for a writ of certiorari, which was granted on April 24, 1939 (R. 239).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that there was "no reasonable ground" upon which the Board's order requiring respondent to withdraw recognition from and disestablish the Plan as a representative of its employees could be sustained.

2. In refusing to enforce and in setting aside paragraph 2 (a) of the Board's order.

SUMMARY OF ARGUMENT

I

The Board found that both before and after the 1937 amendments to the Plan, respondent dominated and interfered with the administration of that labor organization in violation of Section 8 (1) and (2) of the Act. Those findings are fully supported by the evidence.

II

The Board plainly had power to determine that continued recognition of the Plan would interfere with the employees' rights to freedom in self-organization and to decide that withdrawal of such recognition by respondent would effectuate the policies of the Act. *National Labor Relations Board*

v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. The conclusion of the Board in this regard finds full support in the evidence and should have been accepted by the Court below. Both the formal provisions of the Plan and the fact that it cannot possibly be considered to have been freely selected by the employees as their collective bargaining representative require that conditions permitting a free choice be established.

III

A. The factors relied upon by the Court below do not show that the Board's determination concerning the necessity of respondent withdrawing recognition from the Plan was unreasonable. The elimination of certain provisions, which permitted ready domination by respondent, cannot dissipate the effects of respondent's long continued participation and support. *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272. Similarly, petitioner's assertions that, by a referendum and by their participation in the elections held by the Plan, the employees have indicated a free desire for its continuance, are plainly

insufficient to establish that fact. The Board could not assume that respondent's interference with freedom of choice has been unsuccessful and that the choice asserted to have been made by the employees is a free one. Particularly is this so while recognition of the Plan continues to give it a dominant position in the plant. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515. Nor do certain aspects of the Plan's operation relied upon by the court demonstrate that it is a genuine representative of the employees.

B. Apart from their insufficiency to show an abuse of the Board's discretion, the assertions of counsel that the Plan had been amended in certain respects after argument of the cause, and evidence not made the subject of particular findings by the Board, were improperly considered by the court below. If the alleged modifications of the Plan were deemed material, an application to adduce evidence concerning them should have been made under Section 10 (e) of the Act, the Board should have been afforded an opportunity to oppose, and, were the application granted, the Board should have been the one to make findings upon the evidence adduced. In any event, evidence of events occurring subsequent to the Board's order is not normally material to the validity of the order. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *Consolidated*

Edison Co. v. *National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9th), certiorari denied, 306 U. S. 646.

Nor was the result of the referendum and the extent of the employees' participation in the Plan's elections properly before the court. This data, asserted in a letter to the Board after the hearing, was properly excluded by the Board since it was not offered in conformity with the Board's Rules and Regulations. If such exclusion were improper, respondent's remedy was under Section 10 (e) of the Act. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197. The court ignored the requirements of the statute in treating counsel's mere assertions as to events occuring subsequent to the hearing before the Board as uncontroverted facts of record.

Nor was the court at liberty to assume the fact-finding function of the Board in referring to and relying upon bits of evidence not made the subject of particular findings by the Board. Had findings upon these matters been essential to the decision, which they were not, the case should have been remanded to the Board, as the trier of the facts, to supply the findings and appropriate inferences therefrom.

ARGUMENT

The court below has directed enforcement of those portions of the Board's order requiring respondent to cease and desist from dominating, in-

terfering with, and contributing support to the Plan, or to any other labor organization of its employees, and from interfering with, restraining, or coercing its employees in any of the rights guaranteed by Section 7 of the Act (R. 426). The majority of the court, however, refused to direct enforcement of paragraph 2 (a) of the Board's order, which, as affirmative action which the Board found would effectuate the policies of the Act, requires respondent to (R. 203):

> Withdraw all recognition from Employees Representative Committee of the Newport News Shipbuilding and Dry Dock Company, also known as Representation of Employees, as the representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and completely disestablish Employees Representative Committee of the Newport News Shipbuilding and Dry Dock Company, also known as Representation of Employees, as such representatives;

The petition for certiorari presents only a single issue—whether this paragraph of the order should have been granted enforcement.

We believe that the Board's order was entitled to full enforcement, and that the decree of the court below modifying the order by striking out paragraph 2 (a) should be reversed. We shall show, first, that the Board was admittedly correct

in concluding that respondent had violated Section 8 (1) and (2) of the Act. Second, we shall show that on the record made before the Board it was fully warranted in concluding that paragraph 2 (a) of the order would effectuate the policies of the Act. Finally, we shall discuss the court's reliance upon certain factors which, it concluded, showed that paragraph 2 (a) is without reasonable basis.

I

Respondent Has Admittedly Engaged in Unfair Labor Practices Within the Meaning of Section 8 (1) and (2) of the Act

Respondent has filed no cross-petition from the decree of the court below enforcing those portions of the Board's order other than paragraph 2 (a). Nor has respondent attempted in its brief in opposition to the Board's petition for certiorari to support the decision of the court below with respect to paragraph 2 (a) on the ground that there has been no violation of the statute, and that, therefore, the whole order should have been denied enforcement. Respondent had plainly engaged in numerous and continuing violations of Section 8 (1) and (2) of the Act.

The Board's findings in this respect have already been summarized in the Statement, *supra*, pp. 7–12, and the evidence in detail will be set out in Point II, *infra*, pp. 21–30, in the discussion of the propriety of paragraph 2 (a). Here it will be sufficient

to point out that before the revision of 1937—*i. e.*, from July 5, 1935, the effective date of the Act, to June 30, 1937, the effective date of the 1937 revision of the Plan, respondent paid the so-called "employee" representatives, elected by the employees, for their service in that capacity (R. 153); respondent had an equal voice on all committees (R. 155); respondent had a complete nullifying power over the procedure for settlement of grievances (R. 156–157); and respondent had a complete and effective veto of all amendments to the Plan by its equal voice in the committee which could amend only by a two-thirds vote (R. 157).[7] See pp. 21–24, *infra*. After the 1937 amendments, which inevitably, because of respondent's participation in and veto power under the amendment procedure, were themselves not the product of free and untrammeled action by the employees, respondent's control persisted by its veto power over both the action taken by the Employees' Representative Committee (R. 151) and over all amendments (R. 152–153). Financial and other support was continued (R. 42, 77, 89–90, 103–104, 44–46, 107). See pp. 24–30, *infra*. Plainly, the Board had no alternative but to find that respondent had violated and was violating Section 8 (1) and (2) of the Act.

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[7] Respondent's suggestion (Br. in Opp., p. 15) that the Act was not held constitutional by this Court until April 1937 is, of course, completely irrelevant.

II

On the Record Made Before the Board Paragraph 2 (a) of the Order Is Valid and Proper

The Board, having properly found that respondent had violated Section 8 (1) and (2) of the Act, was authorized by Section 10 (c) of the Act to require, in addition to the cessation of such practices, such affirmative action as would effectuate the policies of the Act. In the exercise of its duty in this respect the Board concluded that respondent should withdraw recognition from and disestablish the Employees Representative Committee as the representative of its employees for collective bargaining. No question exists as to the power of the Board to make such an order. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 268. And no question exists as to the scope of review: the Board was authorized to draw the inference of fact whether the Plan would be a continuing obstacle to the full and free exercise of the employees' rights of self-organization and collective bargaining, and to decide what affirmative action would effectuate the policies of the Act. Its determination is conclusive unless unreasonable because it lacks support in the evidence. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc., supra*, pp. 268, 270–271; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275; *National Labor Relations Board* v. *Fansteel Metal-*

lurgical Corp., 306 U. S. 240, 262. We believe that a brief review of the facts contained in the record dealing with the history of the Plan prior to its amendment in 1937, the procedure by which the 1937 amendments were adopted, and the provisions of the Plan after those amendments will show that the conclusion of the Board was amply supported. We shall deal in Point III, *infra*, with the assertions that the Plan was again changed after the Board's order had been promulgated.

A. THE HISTORY OF THE PLAN PRIOR TO THE 1937 AMENDMENTS

The Plan, as initiated by respondent and its employees in 1927 (R. 75), consisted of a labor organization which was completely respondent's creature. Representatives elected by the employees, who were ostensibly, as "Employees' Representatives", to represent the employees' interests, as opposed to the "Company's representatives" selected by respondent, were paid $100 a year by the respondent for serving (R. 160). Further control by respondent was secured through the provision for equal representation by the Company's representatives and the elected representatives on the five committees which administered the Plan (R. 163). Grievance procedure was carefully scheduled and ended in a blank wall; grievances could be presented to the appropriate foreman, the Management's Representative, and to either a superior officer of petitioner or the General Committee, in that order (R. 165). If no adjustment were reached,

the matter could be referred to the Appeals Committee, and if that Committee in turn failed to reach a settlement, the grievance might be referred to arbitration, if respondent's president agreed (R. 165). If he did not agree, the matter was at an end. Finally, complete control over the form of the labor organization was secured to respondent by the requirement that the Plan could not be amended except (1) by a two-thirds vote of the Rules Committee (one-half of the membership of which were respondent's representatives) or (2) by a "concurrent majority vote of the Employees' Representatives and of the representatives of the Management at an Annual Conference" (R. 166). Collective bargaining free from employer domination and interference was plainly impossible.

Respondent insists that in 1927, when the Plan was adopted, nothing contained in it was illegal or immoral. Its legality may be admitted, however, without in any way affecting the undeniable fact that in its origin and early workings the Plan was simply a creature shackled to respondent both by its form and by its necessary methods of operation. The decisions leave no doubt that the Board, in drawing its conclusions, need not close its eyes to everything which occurred before the passage of the Act. Cf. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 268; *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A.

4th), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; 99 F. (2d) 533 (C. C. A. 9th), certiorari denied, 306 U. S. 646; *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, decided July 20, 1939 (C. C. A. 3d).

The Plan became plainly illegal on July 5, 1935, when the National Labor Relations Act became law. Some changes had occurred since 1927, but the Plan remained much as it had been, respondent's domination, interference, and support continuing in open defiance of the Act. The annual remuneration of employee representatives had been reduced, in 1931, from $100 to $60 (R. 153), but had been restored to $100 in 1936 (R. 35). The five joint committees had been replaced by a General Joint Committee composed of all the elected representatives and an equal number of respondent's representatives, and an Executive Committee, composed of five elected and five of respondent's representatives (R. 155–156). The abortive procedure for arbitration of grievances had been eliminated in favor of the even less effectual provision that if the Executive Committee failed to settle the matter, "the President of the Company shall be notified" (R. 156–157). Respondent's control over the Plan had become absolute by allowing amendments only upon "two-thirds' vote of the entire membership of the General Joint Committee, when approved by the President of the Company" (R. 156). No dis-

cussion is necessary to establish that the Plan was so devised that in all important respects respondent could prevent any expression of the will of the employees free of the management's influence.

B. THE REVISION OF MAY 1937

The characteristics of the Plan underwent some change in form, but very little in substance, in 1937. Indeed, both respondent's interference in the revision of the Plan, and the results which were achieved by that revision, demonstrate the Board's conclusion that the Plan "is incapable of serving the respondent's employees as their genuine representative for purposes of collective bargaining" (R. 199).

1. RESPONDENT'S INTERFERENCE WITH THE REVISION OF THE PLAN

The revision was effected by amending the existing Plan.* Inevitably, therefore, respondent exercised a dominant voice. As stated above, the amendment procedure then in force (R. 156, 157) required not only a two-thirds vote of the General Joint Committee, half of the members of which were respondent's appointees, but also the approval

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*The booklet in evidence (Bd. Exh. 1 K) bears the legend "REPRESENTATION OF EMPLOYEES In The Plant of the Newport News Shipbuilding and Dry Dock Company, Newport News, Virginia," with the notation that the bylaws of the Plan therein provided had been revised 7/1/29, 10/5/31, 2/5/34, 12/8/36, and 6/30/37 (R. 146). The booklets were printed by respondent (R. 77).

of respondent's president. This procedure was followed (R. 90–91, 50–53, 171). And, of course, while this revision was being made the elected representatives of the General Joint Committee, who were the employees' only representatives, were being paid by respondent for their services in that capacity (R. 35).

Respondent's interference, however, was not confined to the inevitable effect of its dominant position in the amending machinery; its officers took an active part in the drafting of the changes. The question of revision arose at a meeting of the General Joint Committee (R. 91). Blanton, the chairman of that Committee, then presented an original draft of the revision to two of respondent's officials—the general manager and the personnel manager (R. 51–52). These officials made numerous changes in the draft, and it was then referred to the Executive Committee, in accordance with prior practice (R. 51–52, 91). The draft then passed successively through the Executive Committee, the General Joint Committee, and a meeting of the elected representatives (R. 91, 52–53). On May 20, 1937, it was finally adopted by the General Joint Committee after the Management's Representative announced at the meeting that the revision "had been discussed with and was acceptable to the Management" (R. 171, 91). At best, the revised Plan was the joint product of respondent and its employees.

2. RESPONDENT'S CONTINUED DOMINATION AND SUPPORT OF THE REVISED PLAN

The practice under the revised Plan, no less than the express provisions retaining a large degree of control in respondent, illustrates its basic principle: that respondent is concerned with, and has at least an equal responsibility in, the activities of its employees toward self-organization and collective bargaining. For example, under the revised Plan respondent's personnel manager regularly receives a copy of the minutes of each meeting (R. 73). That there is no express provision to that effect makes the practice even more, rather than less, significant. Again, respondent's financial and other support of the Plan has been continued. Respondent paid for printing the revised Plan booklets (R. 77, 42) and distributed the copies through its supervisors (R. 42). Respondent regularly makes duplicate copies of the minutes of the meetings of the Employees' Representative Committee at its own expense and on its own stationery, and distributes them through its yard mailing service (R. 103–104, 89–90). Respondent pays the clerks and judges who conduct elections of representatives on its property for the time spent in such activity (R. 44–46, 107).

Aside from these evidences of the supervision and support accorded to the revised Plan by respondent are the express provisions by which respondent definitely retains the power to prevent committee action not agreeable to respondent.

While the revision did eliminate from the committees all representatives appointed by respondent and also eliminated the pay to elected representatives (R. 148, 150–151), it did not eliminate respondent's control.

Two provisions are particularly significant. Section 1 of Article VI (R. 151) provides that:

> The action of this Committee [the Employees' Representative Committee] shall be final, and becomes effective upon agreement by the company.

And Section 1 of Article IX (R. 152–153) provides that any article may be amended by a two-thirds vote of the entire membership of the Employees' Representative Committee, but with the important qualification that:

> Such amendments shall be in effect at the time specified by the * * * Committee, unless disapproved by the Company within 15 days after their passage.

Obviously, by either of these provisions, respondent retains influence and control over action by its employees, in matters of self-organization, which might be adverse to its own desires. The first provision gives respondent a complete and absolute veto over the action of the Employees' Representative Committee, which in turn has complete control over the action of all other committees (Art. VI, Secs. 2, 3; R. 151). The second provision insures the continuation of that control by a complete and absolute check on amendments. Both are plainly

the "domination" and "interference" condemned by Section 8 (2) of the Act.[9]

Respondent, before the Board and in the court below, attempted to avoid the effect of these two provisions by resort to an unrealistic interpretation of the Plan. From the untenable premise that the printed booklet is a contract binding on respondent the conclusion is drawn that only those actions by the Committee and those amendments which affect respondent's "rights" under the "contract" are subject to respondent's approval. Such an interpretation simply cannot be supported.

In the first place, obviously, the Plan is not a contract. No one is bound to do anything. There is no provision for signatures and there are none in fact.[10] But even if the revised Plan were a contract, there is nothing in the Plan which would warrant the limitation which respondent suggests as to the scope of these two provisions. The provision requiring respondent's approval of Committee action, *supra*, p. 27, is a part of Article VI, dealing with the functions of the Committee, and immediately follows a sentence vesting in the Committee power to take action on matters presented to it (R. 151). The approval provision refers to "the action of this Committee" and plainly embraces every type of action which the Committee might take. There is no suggestion of anything

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[9] See Senate Report No. 573, 74th Cong., 1st Sess., p. 10.

[10] Indeed, an effort to have the word "agreed" inserted in the preamble of the 1937 revision was unsuccessful (R. 50).

other than a carefully devised mechanism to give respondent a final veto over all action of the Plan's governing body. Similarly, Article IX, *supra*, p. 27, state that "any article in this book" may be amended in the manner specified, and provides that "such amendments" shall become effective unless disapproved by respondent (R. 152–153).

Finally, if respondent has any "rights" at all under the Plan, they are necessarily "rights" in a field in which the Act forbids them to exist. The matter and the manner of the representation of respondent's employees for purposes of collective bargaining are the exclusive concern of the employees. Respondent completely obliterates the distinction between action *within* a union, as to which respondent can have no rightful voice, and action *by* a union in attempting to obtain its demands by agreement with an employer, as to which respondent has, of course, full freedom of action to accept or reject. The "rights" which respondent here asserts are "rights" to interfere in the former type of action. The assumption which necessarily underlies respondent's argument is that representation for purposes of collective bargaining is a privilege conferred upon the employees by the employer, and is to be exercised under the employer's continuous supervision and control. That is in the teeth of the Act.

Respondent also suggests that the veto powers are of no importance because they have never been

exercised. The circumstance is of no significance. The powers exist and may be exercised. Moreover, a limitation upon employees' freedom of action can be imposed by the existence of a veto power as fully as by its exercise. The record in this case furnishes an apt illustration. When the 1937 amendments were being drawn up, Chairman Blanton submitted his proposed revision to the high management officials of respondent before the Committee had acted on them (R. 51–52) because, knowing that respondent would block any changes undesirable to it, he thought it well to "be advised" in advance of respondent's wishes (R. 73).

The inadequacy of the revised Plan as an effective bargaining agency is further demonstrated by certain significant omissions. There is no provision for payment of dues and the Plan, because of its lack of financial resources, continues to be economically dependent upon respondent for the favors heretofore accorded to it. Moreover, the Plan has the same defect which the Court pointed out in the *Pennsylvania Greyhound* case—there is "no procedure for meetings of members or for instructing employee representatives" (303 U. S. at 270).[11]

[11] The effect of this omission on the efficacy of the Plan as a bargaining agency is aptly demonstrated by the testimony of I. C. Wilkins, Secretary of the old and the revised Plan, that some time in 1937 the governing committee voted in favor of respondent's proposal for an increase in hours of work from 36 to 40 a week, without polling the employees

C. THE BOARD PROPERLY REQUIRED WITHDRAWAL OF RECOGNITION FROM AND DISESTABLISHMENT OF THE REVISED PLAN

On these facts, we submit, the Board was fully warranted in concluding that the Committee was "incapable of serving the respondent's employees as their genuine representative for purposes of collective bargaining" (R. 199), and properly ordered respondent to withdraw recognition from and disestablish the revised Plan as a representative. Indeed, it is difficult to see how any other conclusion would have been possible.

As we have shown above, even after the 1937 revision the Plan was indistinguishable, except in minor matters of detail, from the organization which was ordered to be disestablished in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270. Here, as in the *Pennsylvania Greyhound* case, the Employees' Representative Committee was a "company union so organized that it is incapable of functioning as a bargaining representative of employees." The employees could not, without further amendment of the Plan, take effective action free from respondent's domination, and amendment was sub-

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on their views, and that he voted in favor of the proposal without consulting the employees in his department except that in a poll taken by him a year earlier he found the sentiment of the employees on the proposal to be evenly divided (R. 102–103, 100).

ject to respondent's veto. Free and unhampered enjoyment of the rights guaranteed to the employees by Section 7 of the Act was plainly impossible.

But the Board's conclusion that the Plan should be disestablished need not, and does not, rest solely upon the formal provisions of the Plan. Orders of the Board requiring disestablishment of company-dominated labor organizations have been upheld even though the organizations were structurally capable of functioning as truly independent representatives of the employees. *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.[12] Those

[12] See also *National Labor Relations Board* v. *Ronni Parfum, Inc.*, 104 F. (2d) 1017 (C. C. A. 2d); *National Labor Relations Board* v. *American Mfg. Co.*, decided July 26, 1939 (C. C. A. 2d); *National Labor Relations Board* v. *National Licorice Co.*, 104 F. (2d) 655 (C. C. A. 2d), petition for certiorari granted October 9, 1939, No. 272, this Term, 1939; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3d); *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, decided July 20, 1939 (C. C. A. 3d); *National Labor Relations Board* v. *Griswold Mfg. Co.*, decided Sept. 21, 1939 (C. C. A. 3d); *National Labor Relations Board* v. *J. Freezer & Son, Inc.*, 95 F. (2d) 840 (C. C. A. 4th); *National Labor Relations Board* v. *Wallace Mfg. Co., Inc.*, 95 F. (2d) 818 (C. C. A. 4th); *National Labor Relations Board* v. *Eagle Mfg. Co.*, 99 F. (2d) 930 (C. C. A. 4th); *Virginia Ferry Corp.* v. *National Labor Relations Board*, 101 F. (2d) 103 (C. C. A. 4th); *National Labor Relations Board* v. *Kiddie Kover Mfg. Co.*, 105 F. (2d) 197 (C. C. A. 6th); *Cudahy Packing Co.* v. *National Labor Relations Board*, 102 F.

decisions recognize that domination by the employer, and hence a continuing interference with the employees' freedom of self-organization, may exist even though it is not made inevitable by the form of the labor organization itself.

The decisions have full application here. Irrespective of its specific provisions, the revised Plan cannot possibly be considered the result of a free and untrammeled selection by the employees of their collective bargaining representative. The revised Plan might well have been substantially different if respondent had not had, and had not exercised, its power over the amendment procedure (see pp. 24–25, *supra*). It is impossible to say exactly to what extent respondent dictated features of the revision which it deemed in its own interest. It is possible, however, to say categorically that respondent's control over and active participation in the revision procedure completely bars respondent from any assertion that the Plan was exactly as the employees would have made it had they

(2d). 745 (C. C. A. 8th), certiorari denied, October 9, 1939, No. 81 this Term; *Hamilton-Brown Shoe Co.* v. *National Labor Realtions Board*, 104 F. (2d) 49 (C. C. A. 8th); *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8th); *Wilson & Co., Inc.* v. *National Labor Relations Board*, 103 F. (2d) 243 (C. C. A. 8th); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488 (C. C. A. 9th), certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; 99 F. (2d) 533 (C. C. A. 9th), certiorari denied, 306 U. S. 646; *Swift & Co.* v. *National Labor Relations Board*, decided June 7, 1989 (C. C. A. 10th).

acted alone and free from respondent's interference.

Moreover, the Plan's history of management initiation, participation, and support has inevitably shaped the attitude of the employees toward it as a plan tied up inextricably with respondent's interests.[13] Certainly, too, the continued support, interference, and domination which respondent has accorded the Plan since 1937 (see pp. 26–27, *supra*) has not weakened that attitude. Irrespective of the obnoxious provisions in the Plan itself, the effect of the paternalism which has characterized its administration throughout can be eliminated only by the elimination of the Plan. The language of this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, is apposite (p. 236):

> The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair labor practices.

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[13] The Senate Committee on Education and Labor, discussing Section 8 (2), stated (Sen. Comm. Print Comparison of S. 2961, 73d Cong., and S. 1958, 74th Cong., p. 27):

"As the testimony before the Committee last year and this year amply demonstrates, it is at the stage of 'formation' that employer activity is most effective and harmful."

III

The Assertions and Evidence Relied Upon by the Court Do Not Establish That Paragraph 2 (a) of the Board's Order Was Unreasonable and, in Any Event, Were Improperly Considered By the Court

The court below, in rejecting as unreasonable the Board's determination that disestablishment of the Plan was necessary for creation of the employees' freedom of choice, bottomed its conclusion largely upon certain assertions by counsel as to facts not of record before the Board and upon certain evidence upon which the Board did not make separate findings of fact. The assertions and the evidence referred to were, in brief, as follows: (a) After argument of the cause in the court below, the Committee, subject to respondent's agreement, is alleged to have amended the Plan by eliminating the provision requiring respondent's agreement before action by the Committee became effective and by eliminating respondent's veto over amendments proposed by the Committee. Respondent agreed to these changes. (b) It is said that, in a referendum held on June 7, 1938, subsequent to the filing of the Intermediate Report and to the oral argument before the Board, a large majority of the employees voted to continue the Plan, and that a week later all but 656 of the men participated in the annual election held under the Plan. Counsel

for the Plan asserted these facts by letter to the Board and requested that they be made part of the record. The Board denied this request both on the ground it was not properly made under the Board's Rules and Regulations and because the Board thought the data immaterial (R. 193–194). The court, while not holding that the Board erred in thus excluding the proffered evidence, nevertheless relied heavily upon it, as if it were part of the record before the Board (R. 229, 230). (c) The court found directly from the evidence that respondent had not interfered with freedom of choice or discouraged union activity; that it has assumed none of the expenses of Plan elections since 1935; that there had been no labor disputes in respondent's yard for 43 years prior to the Board's hearing; and that the Committee has enjoyed a measure of success in negotiations with respondent (R. 228–229). The Board did not make separate findings concerning these matters.

We submit, first, that, assuming these assertions and the evidence relied upon by the court to be true, they do not establish that the Board's determination concerning the necessity of paragraph 2 (a) of the order is not supported by substantial evidence. Second, we believe that the court improperly considered the assertions of counsel and the evidence referred to. We shall consider these contentions in turn.

A. THE ASSERTIONS AND EVIDENCE DID NOT SHOW PARAGRAPH 2 (A) TO BE UNREASONABLE

The Board's determination that continued recognition of the revised Plan by respondent would impair the employees' freedom to select their own bargaining representatives, is entitled to finality if supported by substantial evidence. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275. We have discussed, *supra*, pp. 21–30, the overwhelming proof which supports the reasonableness of the Board's finding in this regard. The court below plainly erred, we think, in concluding that the assertions and the evidence here under discussion overcame the evidence supporting the Board's finding and made that finding unreasonable.

1. After oral argument of the case, the court was advised by counsel for the Committee that respondent and the Committee had amended the Plan by eliminating certain provisions which, the Board found, permitted ready domination of the Plan by respondent.[14] Even were we to assume that the

[14] The reply brief submitted on behalf of the Committee, intervenor, contained (p. 3) the following assertion, which the court accepted as true:

"With reference to the language in Section I of Article VI and in Section I of Article IX, Counsel for the intervenor, petitioner wishes to advise the Court that on November 22, 1938, the Employees' Representative Committee unanimously

presence of these provisions in the Plan's organic law constituted the whole, or even the essence, of respondent's illegal relations with the Plan, a cessation of such relations would not deprive the Board of power to issue an order reasonably designed to remove their effects upon the employees. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230. But we need hardly resummarize the Plan's long history of domination and support, its amendment in 1937 under the supervision of respondent, and respondent's continued domination and support after the amendments, in order to demonstrate that the excised provisions were not the sole, or even the most important, means by which the Plan's subservience to respondent was assured.

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amended Section I of Article VI by striking out the last sentence in Section I of Article VI and thus deleting from the written plan the following language: 'The action of this Committee shall be final, and become effective upon agreement by the Company.'

"And in striking from Section I of Article IX the last eleven (11) words, namely, 'unless disapproved by the Committee within fifteen days after their passage.'

"Since the language in question applied only to contractual matters effecting (sic) the employer and employees and not to the internal affairs of the Employees' Representative Committee, and was so understood by both parties, notice of this action by the Committee has been served on the Ship Yard and agreed to by them."

The record establishes beyond dispute that the Plan was and is a relic of days when company-dominated labor organizations served as an outstanding means of denying to employees freedom to choose their own bargaining representatives. The structure of such an organization is not conclusive in determining whether it has been foisted upon the employees and whether they are, in truth, free to choose a representative. It is, in short, contrary to reason to urge that the effects of respondent's sponsorship of and long-continued participation in the Plan can be dissipated simply by changing the Plan's structure, and that thereupon the revised Plan would cease to enjoy the influence that respondent has conferred upon it by illegal means. So long as the revised Plan remains, respondent's employees cannot make an independent and uninhibited selection of a collective bargaining representative. Their attitude toward the revised Plan is shaped, and must continue to be shaped, by the known attitude of respondent.

Respondent's contention does not differ in substance from that urged in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. There the employer contended that a disestablishment order should be refused enforcement because the company-dominated union was not *structurally* incapable of serving as a true col-

lective bargaining representative, and, once the cease and desist portions of the Board's order were granted enforcement, the acts of domination and interference would cease (Brief, pp. 71–72). This Court, as it has stated before in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236, and held in *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275, refused to accept the view that the mere cessation of unfair labor practices can transform a labor organization which has been dominated, supported, and interfered with into a free and independent choice of the employees as their collective bargaining representative. The Court enforced the order requiring withdrawal of recognition from and disestablishment of the company-sponsored union (306 U. S., at 262).

2. The claim that the employees, by their participation in the elections and by their vote in the referendum, have evidenced their free acceptance of the Plan, is entirely lacking in substance. It casually assumes that respondent's efforts to suppress all freedom of choice have been unavailing. In view of respondent's thorough domination, support, and interference with the Plan, the attitude of the employees toward it was and is necessarily shaped thereby. By the same token, the existence, membership, and functioning of the Plan must be ascribed, in large measure, to that influence. Indeed, to contend otherwise is to deny the basic

Congressional findings declared in Section 1 of the Act—that such employer conduct precludes freedom of choice.

Chief among the harmful results of respondent's unlawful conduct is its recognition of the Plan, for recognition is a "pivotal factor" in the selection of a bargaining agent as well as in its functioning. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515. While such recognition continues, the employees cannot be free to make an independent decision concerning the Plan. No other labor organization could successfully present its merits as compared to those of the Plan for free judgment by the employees so long as the Plan continues in its dominant position as recognized bargaining agent. In the absence of any practicable alternative save total absence of representation, the employees may prefer to retain the Plan. Whether this or tacit acquiescence in a course of illegal conduct which has gone on for so long as to seem inevitable is the reason for the employees' choice, the support for the revised Plan shown in the referendum can only be termed a reflection of the extent to which respondent's unfair labor practices have canalized the desires of the men.

Thus, in relying upon the referendum and election as reflecting a free choice by the employees, the court below ignored the compulsions engen-

dered by the Plan's recognition and by the support and favor for it which respondent never sought to conceal. The statement of this Court in *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 274–275, is particularly pertinent:

> In ordering withdrawal of recognition of the Drivers' Association by respondent, the Board pointed out that a mere order to cease the unfair labor practices "would not set free the employee's impulse to seek the organization which would most effectively represent him"; that continued recognition of the Drivers' Association would provide respondent "with a device by which its power may now be made effective unobtrusively, almost without further action on its part. Even though he would not have freely chosen" the Association "as an initial proposition, the employee, once having chosen, may by force of a timorous habit, be held firmly to his choice. The employee must be released from these compulsions."

3. The evidence in the record concerning which the Board did not make particular findings of fact (*supra*, p. 36) had, of course, been considered by the Board in making the findings it did. Consequently, the court could properly have considered it along with all of the other evidence in the record in determining whether the Board's findings were adequately supported. When thus properly considered, however, we believe that this

evidence plainly did not warrant a conclusion that the Board's findings lacked substantial support, or that paragraph 2 (a) of the order was not a proper exercise of the Board's discretion.

First, despite the court's statement to the contrary, this evidence was in many respects not "uncontradicted." The court was in error, for example, in stating (R. 228) that respondent, during the life of the Plan had not in any way interfered with the selection by the employees of representatives of their own choosing. That was precisely the basic question at issue, and the court's statement is contrary to the conclusion of the Board and all the evidence upon which it was based (pp. 21–30, *supra*). Again, the statement by the court (R. 228) that all expenses of the elections under the Plan since 1937 have been borne by the employees is directly contrary to the undisputed evidence that respondent not only allows the elections to be held on its property, but also pays the clerks and judges of the elections for the time spent in such activity (R. 44–46, 107). Finally, the statement of the court (R. 229) that respondent has not discouraged membership in any union is contradicted by all the evidence of support accorded to the Plan, with the consequent discouragement of other union activity (pp. 21–30, *supra*).

Second, the other facts which the court found were not of significant weight in the circumstances

of this case and were plainly insufficient to establish that the Board's findings lack substantial support in the evidence. Thus an absence of labor disputes (R. 228) does not indicate either that respondent's employees have had full freedom to choose their collective bargaining representatives or that the policies of the Act have been effectuated for years past in respondent's yard. The peace obtaining during the truce resulting from employer domination of the employees' representatives cannot be ~~submitted~~ by respondent for the stable peace contemplated by the Act, based upon the adjustment of differences through negotiations between the employer and the freely designated representatives of his employees. The Act proceeds upon the premise that repression, whether or not it extracts present acquiescence from employees denied the right to organize freely, may finally lead to explosion.

Similarly, we think the court ignored the realities in characterizing the Plan as a successful representative of the men because it may have secured them certain benefits through negotiations with respondent (R. 229). Although the labor contract is the "manifest objective" of true collective bargaining (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236), the Plan has not resulted in a single collective agreement covering wages, hours, or working conditions during the 9 years the Plan had been in effect up to the time of the hearing (R. 100).

Moreover, that some improvements may have followed the "bargaining" does not establish that the negotiations were between free agents. Upon the court's reasoning, gratuitous concession by an employer occupying both sides of the "bargaining" table justifies his continued denial of an opportunity to achieve the genuine negotiation intended by Congress.

We submit, therefore, that neither separately nor taken together do the assertions by counsel and the foregoing evidence relied upon by the court justify its conclusion that paragraph 2 (a) of the Board's order did not have substantial support. On the contrary, we believe that, on the record before it, the Board did not abuse its "judgment and discretion in determining * * * whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. Paragraph 2 (a) of the order, which represented an exercise of that discretion, was entirely reasonable and entitled to enforcement.

B. THE COURT BELOW IMPROPERLY CONSIDERED THE ASSERTIONS OF COUNSEL AND THE EVIDENCE NOT MADE THE SUBJECT OF PARTICULAR FINDINGS BY THE BOARD

Entirely apart from their lack of significance in determining whether or not the Board could reasonably have found disestablishment of the Plan to be required (*supra*, pp. 37–45), the as-

sertions of counsel upon which the court depended were, moreover, not entitled to be considered at all. The court, in determining the validity of the Board's order, could not properly rely upon matters not shown in the record. Similarly, the evidence not made the subject of separate findings by the Board was improperly considered by the court below.

1. THE ASSERTION CONCERNING AMENDMENT OF THE PLAN SUBSEQUENT TO THE BOARD'S ORDER

As we have seen (*supra*, pp. 37–38), the court accepted and gave weight to assertions in a reply brief filed on behalf of the Committee to the effect that the Plan had been amended after argument of the cause below. We submit that the court's consideration of the statements (R. 230) was contrary to the specific mandate of Congress expressed in the Act. By Section 10 (e), Congress has recognized that in a certain limited class of cases there may be an occasion for adducing additional evidence subsequent to the decision of the Board; and has provided a specific method for bringing such evidence to the attention of the reviewing court. That section provides, in part, as follows:

> If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the fail-

> ure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, * * * which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

Even had such an application been addressed to the court under Section 10 (e) it should have been denied on the ground that the proffered evidence was not "material," within the meaning of Section 10 (e) (*supra*, pp. 37–40). Certainly, however, in the absence of any such application, there was no basis whatever for the consideration by the court of these *ex parte* statements.

Section 10 (e) provides an unquestionably valid procedure. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 226. That procedure contemplates that there shall be an application, with full opportunity to oppose, and that certain conditions shall be met—that the proffered evidence shall be shown to be "material," and that "reasonable grounds for the failure to adduce such evidence in the hearing" before the Board be proved. It contemplates that, if the court is satisfied that these conditions are met, the *Board*, not

the court, shall hear the evidence and make findings upon it, and that the findings shall in turn be entitled to finality if supported by the evidence. Finally, it contemplates that the Board shall have the opportunity of recommending to the court, on the basis of its new findings, whether the order previously entered should be modified, and to what extent.

The contrary course followed by the court below completely nullifies that section. Assertions of fact are made in a reply brief submitted subsequent to oral argument, and are used as a basis for modifying the order of the Board. No opportunity was afforded the Board to oppose the introduction of additional evidence on the propositions of fact asserted. No hearing was given on the vital question of materiality and previous availability. No opportunity was afforded the Board to weigh the evidence, to ascertain the truth, to make findings of fact.[15]

Further, the action of the court below conflicts with the well-settled principle that events which occur subsequent to the order of the Board are not "material" on the question of the validity of the

[15] Orderly procedure clearly requires that tribunals, judicial as well as administrative, make their findings upon evidence, not upon *ex parte* assertions made after the record has been completed.

Board's order and the propriety of its enforcement by judicial decree. Orders entered upon the basis of the record should be enforced or denied enforcement on the basis of that record, not upon that record plus such additional events as may have transpired since the record was made. Any other rule would deny finality to the administrative process, and would certainly nullify completely the provision in Section 10 (e) of the Act that the court—

> * * * shall have jurisdiction * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree * * *.

This principle has found frequent expression in the opinions of this and other courts under the National Labor Relations Act. It is clearly enunciated in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 262, where the Court stated (p. 271):

> But an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made.

See also *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230. And in *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9th), certiorari denied,

306 U. S. 646, Judge Stephens persuasively stated (p. 541):

> If occurrences subsequent to the order of the Board were material it would be impossible to determine the propriety of reinstatement and back wage orders upon the record made at the Board's hearing—the record upon which this Court has a duty to determine the validity of the order and the respondent's duty to comply therewith. In the interval between issuance of the Board's order and the determination of the matter by the Court, the employees discriminated against might find work elsewhere. Since this could be neither affirmed nor negatived by the record upon which the Board must reach a decision, the Board could never know whether reinstatement with back wages was an appropriate remedy in a particular case, nor could the Court judge the propriety of the order upon the record made before the Board.

See also *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C. C. A. 7th); *National Labor Relations Board* v. *Oregon Worsted Co.*, 94 F. (2d) 671, 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197 (C. C. A. 9th); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488 (C. C. A. 9th), certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3d).

Section 10 (e), *supra*, pp. 46–47, providing a procedure for the presentation and consideration of evidence after the order of the Board has been issued, is wholly consistent with this principle. That section specifically provides that the evidence which it is desired to adduce must be "material." As the decisions cited above hold, evidence of events subsequent to the entry of the order of the Board normally cannot meet this qualification since such events are irrelevant to the validity of the order. Section 10 (e) was designed to allow the introduction of *newly discovered* evidence, or evidence improperly excluded by the Board. Indeed, the conditions specified in the section as prerequisites to the consideration of new evidence are, in substance, a restatement of the rules determining the admissibility of newly discovered evidence in courts of law. See *Cyclopoedia of Federal Procedure*, Vol. 5, Sec. 1481.

2. THE ASSERTION CONCERNING THE REFERENDUM ON CONTINUANCE OF THE PLAN AND THE EXTENT OF EMPLOYEE PARTICIPATION IN THE ELECTIONS

The court also gave weight to data concerning the results of a referendum held in June 1938 and the extent of employee participation in elections held by the Plan (R. 229). This data was offered in a letter from respondent's counsel and was excluded by the Board as improperly offered under its rules, and because the evidence was deemed immaterial (*supra*, pp. 35–36). The court below, while not holding that this exclusion was improper, relied

upon the data in setting aside paragraph 2 (a) of the order (R. 229).

We submit that the data should not have been considered by the court. Section 14 of Article II of the Board's Rules and Regulations—Series 1, as amended, upon the basis of which the Board excluded the data from the record (R. 1–15), is set out in the margin.[16] It is certainly valid as an appropriate exercise by the Board of reasonable control over the conduct of the proceedings. *Philadelphia & Trenton Railroad Co.* v. *Stimpson*, 14 Pet. 448, 463; *Cox* v. *Hart*, 145 U. S. 376, 380–381; *Fidelity & Deposit Co.* v. *Bucki & Son Lumber Co.*, 189 U. S. 135, 143; *Franklin* v. *South Carolina*, 218 U. S. 161, 168; *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 77 F. (2d) 886, 887–888 (C. C. A. 2d), certiorari denied, 296 U. S. 617. It provides a procedure which is designed not only to secure an orderly handling and disposition of motions by the Board, but also to give to all other interested parties to the proceeding adequate notice and opportunity to be heard. Respondent's counsel was served by the Board with a copy of the Rules

[16] SECTION 14. All motions made previous to or subsequent to the hearing shall be filed in writing with the Regional Director issuing the complaint, and shall briefly state the order or relief applied for and the ground for such motion. The moving party shall file an original and three additional copies of all such motions for the use of the Board. Immediately upon the filing of such motion, the moving party shall serve a copy thereof upon each of the other parties to the proceeding. All motions made at the hearing (except motions to intervene, as provided in Section 19 of this Article) shall be stated orally and included in the stenographic report of the hearing.

and Regulations, but in any event cannot plead ignorance. Consequently, we submit, the data were properly excluded from the record and, therefore, were improperly relied upon by the court below.

However, even if the action of the Board in excluding the data was, for any reason, erroneous, respondent cannot now complain, since Section 10 (e) of the Act, *supra*, pp. 46–47, provided an adequate remedy by which the proffered evidence could have been added to the record. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 226. Had respondent pursued that remedy, instead of waiving it, and had the court then decided that the evidence should be received, the parties would have had full opportunity to adduce competent proof concerning the referendum and the elections. It was a plain disregard of Section 10 (e) for the court to treat the unverified and *ex parte* statement of respondent's counsel as an uncontroverted fact of record entitled to finality. The court below erred in giving weight to the letter; proper judicial administration required that the propriety of the disestablishment provisions of the Board's order be determined without reference to the statements contained therein.

a. THE EVIDENCE NOT MADE THE SUBJECT OF PARTICULAR FINDINGS BY THE BOARD

As previously noted, in holding the disestablishment order unreasonable the court below referred to and relied upon (R. 228–230) certain items of evidence in the record. The opinion recognizes that the Board had made no particular findings on the

matters in question (R. 228), but the court, characterizing the facts it found as "uncontradicted" (R. 229), stated that they should be taken into consideration, apparently upon the same level as the findings made by the Board (R. 228, 230). As we have shown (*supra*, pp. 42–45), the court erred in concluding that the facts it found were adequate to warrant setting the disestablishment order aside. In addition, we believe that the manner in which the court treated these items of evidence amounted to an assumption *pro tanto* of the fact-finding function of the Board.

The Act charges the Board, not the reviewing courts, with the function of making the findings of fact upon the evidence (Section 10 (c)). Accordingly, where the reviewing court is of opinion that essential findings have not been made—i. e., findings without which no decision is possible or which, if made, would change the result—the proper practice is to remand to the administrative agency or tribunal so that, exercising its fact finding function, it can supply the necessary findings and draw the appropriate inferences therefrom. *Helvering* v. *Rankin*, 295 U. S. 123, 131–132; *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 206; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270, 271; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117. Compare *Federal Trade Commission* v. *Curtis Publishing Co.*, 260

U. S. 568, 580. Only by this method can effect be given to the statutory provision that the fact findings of the Board shall be conclusive upon review if supported by evidence,[17] a provision designed to carry out the manifest legislative intention that the agency having special knowledge of the particular field should bring its judgment to bear in finding the facts and drawing the proper inferences therefrom.[18] Moreover, in performing that function the agency is equipped to furnish safeguards against improper findings through the procedure of tentative findings, exceptions thereto, and argument thereon, safeguards not available to the reviewing court.

The action of the court below serves perfectly to illustrate the dangers inherent in the contrary course which it pursued. The court sought to justify its action by characterizing the facts upon which it relied as "uncontradicted." Yet actually, as already noted, the court fell into error in stating that respondent had not interfered with freedom of choice; that it had not discouraged union activity among the employees; and that all expenses of elections under the Plan since 1935 have been assumed by the employees (*supra*, pp. 43–45).

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[17] Section 10 (e), (f). See *Washington, Virginia and Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142, 147; *National Labor Relations Board* v. *Columbian Enameling and Stamping Co.*, 306 U. S. 292.

[18] House Report No. 1147, 74th Cong., 1st Sess., pp. 4–8, 11, 23; Senate Report No. 573, 74th Cong., 1st Sess., pp. 4–6, 14–15.

It would seem, however, to be entirely sufficient in the present case to point out that no essential finding was lacking in the Board's decision. The findings of the Board were on the whole record, and being sufficient to support the order. with no material omission, special findings were not required as to the particular portions of the evidence relied upon by the Court.

CONCLUSION

It is respectfully submitted that the decision of the lower court, insofar as it refuses to enforce paragraph 2 (a) of the order of the Board issued against respondent, should be reversed, and the cause remanded with directions to grant the order full enforcement.

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